82-2128

No. 82-

IN THE

Supreme Court of the United States

October Term, 1982

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., BELL TELEPHONE LABORATORIES, INC., NEW YORK TELEPHONE COMPANY, INC., NEW JERSEY BELL TELEPHONE COMPANY, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, THE OHIO BELL TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, and PACIFIC NORTHWEST BELL TELEPHONE COMPANY,

Petitioners,

vs.

LITTON SYSTEMS, INC., LITTON BUSINESS TELEPHONE SYSTEMS, INC., LITTON BUSINESS SYSTEMS, INC., and LITTON INDUSTRIES CREDIT CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, the Second Circuit sustained a $276,000,000 ($276 million) antitrust judgment against a regulated telephone company for engaging in constitutionally protected speech. Its holding flatly conflicts with the decisions of this Court, with the legal standards applied by other courts of appeals, and with Judge Harold Greene's decision on identical evidence in a parallel Government antitrust action. The case presents fundamental and vitally important questions under the First Amendment and the *Noerr-Pennington* doctrine:

(1) whether a public speech and pleadings filed in a legislative rulemaking proceeding can be penalized as a "sham" or as outside the First Amendment where:

(a) the agency initiated the proceeding and the telephone company merely participated by advocating a position on which the agency had invited comments;

(b) the telephone company urged the continuation of existing regulations and its arguments comported with the positions of FCC Commissioners Benjamin Hooks and James Quello, a Federal-State Joint Board, numerous state regulatory commissions, and the National Academy of Sciences;

(c) the telephone company's advocacy was condemned because it was not completely successful; because its arguments were statements of opinions that rested in part on circumstantial evidence, not scientific proof; and because certain "inferences" were drawn from normal incidents of legitimate advocacy?

Three related questions are also raised:

(2) whether, under the *Noerr-Pennington* doctrine, a case can be submitted to a jury under a preponderance of the evidence instruction that does not explicitly state that advocacy is protected, regardless of anticompetitive purposes?

(3) whether the Sherman Act can be violated when a regulated firm files a tariff that is consistent with historic regulatory policies, that is repeatedly held to comply with existing state and federal regulations, and that is ultimately *prescribed* by the agency for certain equipment?

(4) whether, under the "filed tariff" doctrine of *Keogh* v. *Chicago & Northwestern R.R.*, 260 U.S. 156 (1922), telephone company customers can bring private treble damages actions to recover payments made under filed tariffs?

STATEMENT REQUIRED BY RULE 28.1

Petitioners Western Electric Company, Bell Telephone Laboratories, New York Telephone Company, New Jersey Bell Telephone Company, Southern Bell Telephone and Telegraph Company, Ohio Bell Telephone Company, Southwestern Bell Telephone Company, Pacific Telephone and Telegraph Company, and Pacific Northwest Bell Telephone Company are each wholly-owned subsidiaries of petitioner American Telephone and Telegraph Company ("AT&T"). In addition to its other wholly-owned subsidiaries, AT&T has ownership interests in the Southern New England Telephone Company, Cincinnati Bell, Incorporated, and the Cuban American Telephone and Telegraph Company.

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APPENDIX*

*The Appendix to the Petition for Writ of Certiorari ("App.") has been separately bound, pursuant to Rule 36. The Appendix filed in the Court of Appeals will be cited as "A ".

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OPINIONS BELOW

The opinion of the Court of Appeals (App. A, 2a-91a) is reported at 700 F.2d 785. The order of the Court of Appeals denying the petition for rehearing, with suggestion for rehearing in banc (App. D, 134a), is unreported. The District Court decision denying the motion to dismiss and for partial summary judgment (App. B, 94a-127a) is reported at 487 F.Supp. 942, and its decision denying the motion for judgment notwithstanding the verdict or for a new trial (App. C, 130a-131a) is reported at 525 F.Supp. 154. Pertinent portions of the trial court record are reproduced in Appendix E. Because of their importance, the Appendix also reproduces three opinions of the Federal Communications Commission ("FCC"): *AT&T "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605 (1968) (App. F, 161a-174a); *Notice of Inquiry and Rulemaking, (Docket No. 19528)*, 35 F.C.C.2d 539 (1972) (App. G, 175a-180a); and *Supplemental Notice of Inquiry and Rulemaking, (Docket No. 19528)*, 40 F.C.C.2d 315 (1973) (App. H, 181a-186a).

JURISDICTION

The judgment of the Court of Appeals was entered on February 3, 1983. A timely petition for rehearing, with suggestion for rehearing in banc, was denied on March 31, 1983. App. 134a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> "Congress shall make no law . . . abridging freedom of speech . . . or the right of the people . . . to petition the Government for a redress of grievances."

The pertinent provisions of the Sherman Act, 15 U.S.C. §§1 *et seq.*, the Communications Act of 1934, 47 U.S.C. §§151 *et seq.* and the Code of Federal Regulations are reproduced in Appendix I.

STATEMENT OF THE CASE

In this case, the Second Circuit affirmed a $276,000,000 ($276 million) treble damages judgment against petitioners ("Bell"). It held that a jury had permissibly found that Bell had monopolized the markets for two types of telephone instruments used by business customers, Private Branch Exchanges (PBXs)[1] and key telephone systems,[2] and had caused respondents ("Litton")—which had entered these markets in 1971 and initially been very successful—to exit from them in 1974.

The basis for this extraordinary $276 million judgment is that, in 1973, Bell exercised its constitutional right to express its opinion on matters of fundamental public importance by making a public speech and by filing pleadings in an FCC-initiated rule-

[1]A PBX includes a switchboard and a number of extension telephones. The PBX can switch calls from one extension telephone to another as well as permit outside calls to be placed and received.

[2]A key telephone system includes telephone sets with buttons or keys and certain common equipment. The keys give each telephone set access to more than one telephone line.

making proceeding. Bell there argued, on the basis of long-standing public interest concerns and in accordance with the positions of numerous disinterested public representatives, that it would not be in the public interest to order, in the FCC's words, a "basic and substantial change" in monopoly telephone service (App. 176a) by permitting customers to substitute equipment outside the control of telephone companies for integral parts of the telephone network. Instead, Bell urged the continuation of tariffs previously filed in 1968 which allowed telephone customers to provide their own PBXs, key telephone systems, and other telephone instruments, subject to the requirement that telephone companies supply a protective connecting arrangement ("PCA") that performs network control signalling functions essential to the operation of the telephone network.

I. The Regulatory Background.

The Second Circuit's decision ultimately rests on a serious misapprehension of the First Amendment and the *Noerr-Pennington* doctrine, and upon a single erroneous premise about the regulatory history. In the Second Circuit's view, one permissible "version" of this history is that the FCC's decision on reconsideration in *Carterfone,* 14 F.C.C.2d 571 (1968), made it "clear as a bell" that franchised telephone monopolies no longer included telephone instruments or associated equipment and that no company could prohibit the connection of any such customer-provided equipment to the network "absent a showing of actual harm." App. 15a-16a, 50a-51a. Because Bell had no scientific proof that customer-owned PBXs or key systems were invariably harmful, the Court of Appeals held that both Bell's filing and subsequent advocacy of the PCA tariff and Bell's opposition to certification could be found to violate the "mandate in *Carterfone*" and to be "baseless" and a "sham." App. 51a.

The premise of the Court of Appeal's decision is simply false. The FCC's decision in *Carterfone* did not redefine the franchised telephone monopolies to exclude PBXs, key systems, or other telephone instruments. Bell's 1968 "post-*Carterfone*" tariffs were repeatedly held to comply with existing state and federal regula-

tions between 1968 and 1975. Indeed, the FCC never held that the PCA requirement had been illegal; on the contrary, it ultimately *prescribed* the PCA for all uncertified equipment. In deciding whether to go beyond *Carterfone* and redefine the franchised telephone monopolies, the FCC's rulemaking proceeding focused on a broad range of fundamental public policy issues in addition to whether customer-provided equipment could cause network harm. A summary of the regulatory background will place the issues in context.

State and Federal Regulation. Telephone service is subject to concurrent state and federal regulation. State utility commissions regulate intrastate service and have granted franchised monopolies in exclusive certificated areas to Bell companies and more than 1,600 independent telephone companies. Facilities used to provide interstate service are regulated by the FCC.

The regulated telephone network consists of central switching systems, the cables and other transmission facilities that link them to homes and businesses, and telephone instruments and associated signalling equipment located on each customer's premises. This "customer premises equipment" is an essential and interactive part of the network. Telephone instruments convert the human voice into the electrical signals which can be transmitted over the network. Network control signalling equipment associated with telephone instruments emits the electrical impulses into the network that activate the central switching systems and direct and control the network functions essential to its operation.

Because efficient service requires precise coordination, standardization, and control of all components of the network, two related regulatory policies have governed telephone service. First, the franchised monopoly was historically defined as end-to-end telephone service. Telephone companies were required to own, install, maintain, and control all telephone network equipment within their certificated areas, including telephone instruments. State commissions uniformly *prohibited* telephone companies from permitting their customers to provide their own equipment. They reasoned that "divided ownership" of telephone equipment

is incompatible with "efficient service" and that it would lead to a lack of standardization of design, installation and maintenance and ultimately deterioration in service quality.[3]

Second, in addition to the prohibition of the *substitution* of customer provided equipment for any part of the telephone network, the companies' state and federal tariffs prohibited the interconnections or *attachments* of any devices *to* the carrier-provided telephone instruments. These tariff provisions applied equally to electrical interconnections, acoustical interconnections, and passive interconnections for decades.

Carterfone And Its Precursors. After World War II, the FCC recognized distinctions under the interstate tariffs between different types of attachments. In *Use of Recording Devices*, 11 F.C.C. 1033 (1947), the FCC permitted the attachment of customer-provided recording devices that were not available from telephone companies. However, the FCC explicitly required that any direct electrical interconnection be made only through "[a]dequate" carrier-provided "connecting arrangements" designed to protect against "impairments of telephone service [and] harmful voltages or currents." *Id.* at 1048-49. In *Hush-a-Phone Corp.*, 22 F.C.C. 112 (1957), the FCC authorized the non-electrical attachment to telephone handsets of a passive, plastic cup or any other such devices that could cause no systemic or public injury.

Finally, in *Carterfone*, 13 F.C.C.2d 420 (1968), the FCC adopted a new approach to foreign attachments. *Carterfone* involved a device that permits a telephone handset to be coupled with a handset from a private radio system so that voices from one system are picked up and transmitted over the other. Although this non-electrical, acoustical interconnection could have impaired telephone service if sound above certain decibel levels were introduced into the telephone network, the FCC found that the

[3] *Peters Sunset Beach, Inc.* v. *Northwestern Bell Tel. Co.*, 70 P.U.R.3d 97, 101 (Minn. Dist. Ct. 1966); *Netsky* v. *Bell Tel. Co. of Pennsylvania*, 65 P.U.R.3d 145, 149 (Pa. Pub. Util. Comm'n 1966); *City of Los Angeles* v. *Southern California Telephone Co.*, 2 P.U.R. (n.s.) 247, 249 (Cal R.R. Comm'n 1933). See App. 192a (citing numerous other decisions).

Carterfone did not have a significantly greater capacity to cause adverse effects than did the human voice. *Id.* at 435. Because the tariffs prohibited the attachment of devices irrespective of whether they caused harm or impaired telephone service, the FCC invalidated the foreign attachment prohibition in its entirety. However, it specifically invited the telephone companies to "submit new tariffs which will protect the telephone network" against harmful attachments. *Id.* at 426.

Contrary to the Second Circuit's premise (p. 3, *supra*), the FCC's Opinion on Reconsideration in *Carterfone* did *not* establish that customers may provide their own telephone equipment; it established precisely the opposite. The FCC explicitly *rejected* the claim that *Carterfone* had " 'opened the door to customer ownership of telephone handsets,' " and emphasized that the case involved only *attachments* to the telephone network, not "the furnishing of purely telephone system equipment telephone-to-telephone on the message toll telephone system." 14 F.C.C.2d 571, 572 (1968); see App. 166a-167a.

The Post-Carterfone Tariffs. In 1967, quite apart from *Carterfone*, Bell formed a Tariff Review Group, which considered ways to modify its tariffs to open up the telephone network and to permit customer ownership of data processing systems not provided by Bell as well as PBXs and large key systems. See A3951-57. The Tariff Review Group recognized that any equipment connected to the network, no matter how well manufactured, could cause harm or impair the quality of service if improperly designed, installed, or maintained. The Tariff Review Group considered a number of mechanisms to protect the network. It rejected the option of undertaking to have Bell itself evaluate the design, installation, and maintenance of competitor's products, because that posed insuperable antitrust problems. A3958-78; see *Radiant Burners, Inc.* v. *Peoples Gas, Light & Coke Co.*, 364 U.S. 656 (1961). It also rejected an option of providing a PCA that would, through hardware, protect the network against every conceivable type of possible harm, including excessive decibel levels, because a PCA of that kind would have been overly expensive. A11998. Bell decided to protect against some potential

harms (*e.g.* acoustical ones) through standards, to protect against others through a simpler PCA, and to continue to provide all network control signalling functions through telephone company equipment.

In 1968, Bell filed "post-*Carterfone*" tariffs that permitted the unlimited acoustical and inductive interconnection of devices like the Carterfone, provided that they met certain standards for signal power. App. 164a. The tariffs further permitted telephone customers to, for the first time, provide their own PBXs, key telephone systems, and other telephone instruments, if they were connected to the network through a PCA that performed network control signalling functions. App. 165a. Because these tariffs applied to facilities used in common for intrastate as well as interstate service, they were filed with 48 States and the District of Columbia as well as with the FCC.

Before the FCC, a number of parties moved to reject the Bell tariffs on the ground that because they barred "customer-provided network control signalling units irrespective of whether they are harmful or harmless to the rest of the messsage toll telephone system," they violated the FCC's mandate in *Carterfone*. App. 166a. The Commission flatly rejected this argument. It reiterated that *Carterfone* had only involved *attachments* to the carrier-provided telephone system, and that the system *included* the telephone instruments that provide network control signalling. *Id.* It further reiterated that *Carterfone* "does not hold that a customer may substitute his own equipment or facilities" for any part of that network, "whether it be telephone instruments, loops, poles, or signalling equipment." *Id.* at 166a-167a. Thus, the FCC's opinions make it explicit that it was Bell which voluntarily allowed the competitive provision of PBXs and key systems, *not* the FCC. Between 1968 and 1975, the FCC explicitly reiterated its holding that the post-*Carterfone* tariffs complied with *Carterfone* and with existing federal regulations no fewer than *five* times.[4]

[4]App. 166a-167a; *AT&T "Foreign Attachment" Tariff Revisions*, 18 F.C.C.2d 871 (1969); App. 178a-179a; App. 182a; *Telerent Leasing Corp.*, 45 F.C.C.2d 204, 221 (1974); *Mebane Home Telephone Co.*, 53 F.C.C.2d 473 (1975).

However, because the FCC did not wish to be foreclosed from ordering a different approach in the future, it did not specifically approve or prescribe the post-*Carterfone* tariffs. *Id.* at 167a.

Similar proceedings were conducted in many state commissions. Each initially allowed the tariffs to take effect in recognition that they did "little violence . . . to the traditional carrier responsibility for end-to-end telephone service." Comments of National Association of Regulatory Utility Commissioners ("NARUC") in FCC Docket 19528, p. 17 (Oct. 17, 1973). A number of state commissions held administrative hearings and explicitly upheld the PCA requirement. For example, the New York Public Service Commission held that the telephone company control over network signalling by means of the PCA was "absolutely necessary to ensure reliable service." *New York Tel. Co.*, 79 P.U.R. 3d 410, 417 (1969).

In response to manufacturers' arguments, the FCC thereafter instituted informal proceedings to consider whether it would be possible to develop technical standards under which customers could provide their own network control signalling units without impairing service. The FCC emphasized, however, that it ordered these proceedings solely because it "believed that if an acceptable standards program could be developed," it "would be in a better position to judge whether such a program [is] in the public interest." App. 177a.

The Commission's first step was to commission a study by the National Academy of Sciences ("NAS"). In June, 1970, the NAS study concluded that "uncontrolled interconnection to the common carrier network as it now exists would be harmful" and that the post-*Carterfone* tariffs of the carriers were a reasonable way to protect the network. A7214, 7221. It also found that the only alternative approach to the PCA would be a certification program in which the FCC would directly regulate the design, manufacture, installation, and maintenance of equipment. A7226-28. In March, 1971, and January, 1972, the FCC's Common Carrier Bureau established two advisory committees of industry participants to develop technical network protection standards for partic-

ular categories of equipment, including PBXs. At the same time, the Office of the Chief Engineer of the FCC, NARUC, and others were developing their own technical standards proposals.

II. The FCC's Rulemaking Proceedings.

In June, 1972, the FCC instituted a legislative rulemaking proceeding (Docket 19528). App. 176a-180a. It assumed that it would shortly have technical standards submitted from each of four groups then preparing them. *Id.* at 178a. It therefore instituted the proceeding to consider a different question: whether, as a matter of policy, it would be in the public interest to order a "basic and substantial change" in telephone service, and to *redefine* the franchised telephone monopolies to *exclude* integral parts of the telephone system and to permit customers to install their own network control signalling units. *Id.* at 176a. The FCC recognized that any such change would "as a practical matter" have to apply to "local exchange and intrastate service" regulated by state commissions because almost all signalling units are "used in common for both interstate and . . . intrastate communications." *Id.* at 178a. It thus took the extraordinary step of convening a Federal-State Joint Board to sit as an administrative law judge. *Id.*

The FCC reiterated that the post-*Carterfone* tariffs had already been held to comply with existing regulations (*Id.* at 178a-179a) and that the proceeding "raises no questions of lawfulness of any existing tariff." *AT&T, Revisions of Tariff FCC No. 260,* 41 F.C.C.2d 239, 240 (1973). Instead, the FCC stated the question was whether "to go *beyond what* [*it*] *ordered in Carterfone*" (App. 179a), and whether "telephone companies . . . should be required or *permitted* . . . to give customers additional options that they do not now have," (App. 182a) and that could "conflict with intrastate tariffs." *AT&T, Revisions of Tariff FCC No. 260, supra,* 41 F.C.C.2d at 240. After the submission of four proposals for technical certification standards, the FCC, in April, 1973, formally sought comments on each of these proposals and on the additional option that the existing tariffs "remain basically unchanged." App. 184a.

The Public Debate. This request for comments led to one of the most fundamental debates in the history of telecommunications. It ultimately produced dramatic changes in telephone service, whose ramifications are still being felt and publicly debated. See, *e.g.*, Saddler, *Future Rises In Phone Rates Are Attacked*, Wall St. J., June 22, 1983, at 29, col. 3 (describing effect of FCC policies and new legislative proposals to make basic telephone service more affordable).

The debate had at least four separate aspects. The first was the issue of harm to the network. What was the most cost-effective way to protect against particular harms? The second was the effect of certification on the quality of service and where best to draw the line between the regulated monopoly and the competitive aspects of telecommunications. Would division of responsibility over integral parts of the network create operational inefficiencies, impair the quality of existing service, and prevent or impede future innovations and improvements in service? The third set of issues—perhaps the most passionately contested—were social and economic. Would certification end or impair long-standing state regulatory policies of using above-cost rates from PBXs, key systems, and other business equipment to subsidize basic telephone service to make it more affordable for ordinary households?

The final, related issue was one of federalism. The States vehemently opposed certification and several States had, by that time, instituted proceedings to rescind Bell's post-*Carterfone* tariffs and to prohibit any customer ownership of telephone instruments, even when connected through PCAs, on the ground that even these tariffs could impair universal service. See *Telerent Leasing Corp.*, 45 F.C.C.2d 204 (1974). Did the FCC have the power to preempt state regulation of facilities used to provide intrastate service? As a matter of federalism, should the FCC exercise this power and preempt the states' definitions of the franchised telephone monopolies?

In 1973, after much internal debate and discussion, Bell decided upon its response to the public debate. Like the state commis-

sions and NARUC, Bell opposed certification. However, Bell advocated the PCA requirement and disagreed with those States which sought to rescind the post-*Carterfone* tariffs, although it argued that state regulation should not be preempted. Bell stated the basis for its position in September 1973, in a public speech by its then chairman, John deButts. The Court of Appeals characterized this speech as the "coda marking Litton's demise as a competitor." App. 21a; see *id.* at 31a.[5]

The following month, in October, 1973, Bell filed 251 pages of comments in Docket 19528. A13170-13421. Bell's basic theme was that the regulatory policy of end-to-end responsibility had resulted in the best telecommunications system in the world and had made essential telephone service affordable for ordinary households. It argued that the division of responsibility that would result from certification could threaten vital national resources and have severe repercussions for local rates and the availability of telephone service to the average consumer. See App. 136a-140a.

First, although it had no scientific proof of harm to the network, Bell stated that the National Academy of Science's study had demonstrated the risk of "specific harms" to the network. App. 142a. Second, Bell's Comments stated that "specific harms" are only a limited aspect of the problem, because "overall quality of service is a vital concern." *Id.* Although it cautioned that "complete and exhaustive statistics" might never be obtainable, Bell's comments stated that the impact of interconnection on the "quality of service" is "real or actual," not merely "potential." It reported that its studies (the "Hunt studies") showed trouble reports 25 to 50 percent higher for lines that had customer provided equipment and that 8.5 percent of customers using their own data systems were found to be applying excessive signal

[5]Judge Charles Richey, in contrast, has found that the speech "shows a genuine concern on the part of Mr. deButts for the protection of the telecommunications system for *all*" and that "the theme was not one of anticompetition, but rather, one of *pro* consumer." *Southern Pacific Com. Co.* v. *AT&T*, 556 F.Supp. 825, 902 n.74, 903 (D.D.C. 1983) (emphasis in original).

power. App. 143a-144a. It stated that the data "are sufficiently consequential" to suggest that interconnection "had already had an adverse impact on the quality of service" and that further liberalization was inappropriate. *Id.* Bell further argued that customer provision of signalling equipment would cause operational inefficiencies, because carriers would not control all network facilities and would be impeded in responding to trouble reports. A13216-29. In addition, Bell made detailed showings that elimination of carrier control over signalling units would impair innovation because all the major advances in telephony had required *parallel* modifications in central switching systems and signalling units. A13210-14, 13324-51.

Bell also evaluated the four certification proposals then before the FCC and concluded that, under the standards of the National Academy of Science's report, each was inadequate because it failed to take sufficient steps to protect against improper installation or maintenance of customer provided equipment and that each would be more costly than the PCA and less cost-effective. A13255-84. Finally, it urged that the PCA approach was preferable because it imposed the costs on the large businesses which benefitted from competition and would not impair the regulatory practice of pricing business equipment to subsidize residential rates. A13230-36; 13198-202. NARUC, numerous state commissions, and independent telephone companies made parallel arguments.

The FCC's Decisions. In 1974, the FCC decided it could and would preempt state regulation of customer premises equipment. *Telerent Leasing Corp., supra.* Its authority to do so was upheld by a 2 to 1 decision in *North Carolina Utilities Comm'n.* v. *FCC,* 537 F.2d 787 (4th Cir.), *cert denied,* 429 U.S. 1027 (1976).

In 1975, the FCC decided to adopt a certification program for data systems and other ancillary equipment. PBXs and key telephone systems, however, were excluded from the program pending additional consideration by the Federal-State Joint Board. *First Report and Order,* 56 F.C.C.2d 593 (1975). In 1976, the Board concluded that certification of PBXs and key systems at that time would be "adverse to the public interest," expressing

concern about the economic and social effects (which were being considered in Docket 20003, a separate fact finding inquiry) as well as technical harms. Later that year, after first concluding that no showing of any actual economic harm had been made to date in Docket 20003,[6] the FCC reversed the Joint Board and, over the dissents of Commissioners Benjamin Hooks and James Quello, ordered that PBXs and key systems be included in the program. *Second Report And Order*, 58 F.C.C.2d 736, 740 (1976). However, in recognition of the special technical problems presented by this equipment, the FCC ordered that PCAs be engineered into any certified equipment. In 1978, the FCC eliminated the PCA requirement for registered PBXs and key systems. *Third Report And Order*, 67 F.C.C.2d 1255 (1978). The FCC's decisions rejected the National Academy of Science's conclusion that there had to be direct regulation of installation and maintenance. The FCC's technical standards occupy 132 pages in the Code of Federal Regulations. See 47 C.F.R. §§ 68.1-68.506 (1982).

Contrary to the Second Circuit's premise (p. 3, *supra*), the FCC did not hold that the PCA requirement had been "unreasonable" at any prior time. On the contrary, in the absence of a system of certification, the PCA had been necessary. The FCC adopted regulations that to this day *prescribe* the use of PCAs with any unregistered equipment, see 47 C.F.R. §68.102; App. 190a, reasoning that the "likelihood of harm" was "sufficiently high," *irrespective* of whether the specific equipment had been shown to be harmful. *Third Report And Order, supra*, 67 F.C.C.2d at 1272 & n.21. The FCC found that the PCA requirement became "unreasonable" within the meaning of the Com-

[6]The FCC had stated to Congress that it was "essential" that these economic factors be examined before a decision was reached on PBX certification. See Statement of Richard E. Wiley, Chairman of FCC, Before The Subcommittee On Communications of The Senate Committee On Commerce, 94th Cong., 1st Sess. p. 63 (April 21, 1975). In September, 1976, the FCC issued its Docket 20003 report that rejected the economic objections to certification. ***Economic Implications And Interrelationships Arising From Policies And Practices Relating To Customer Interconnection, Jurisdictional Separations, And Rate Structure***, 61 F.C.C.2d 766 (1976).

munications Act when, and only when, the FCC had both adopted technical standards defining "benign connections" and determined that particular equipment complied with those standards. *Id.*[7]

III. The Present Case.

Litton entered the market for PBXs and key telephone systems in 1971, after the PCA requirement had been in effect for several years. Initially, Litton was very successful. In early 1974, following the indictment of four of its top telephone equipment executives for commercial bribery, Litton decided to leave the market. It filed this action in June, 1976, seeking to recover its losses and alleged lost profits as a competitor through 1990 of $570,082,000, and also to recover the tariffed charges it paid for PCAs as a user of customer provided equipment from 1969 through 1979 of $491,778.

The Trial Court Proceedings. Litton's trial presentation focused on two sets of allegations. First, Litton challenged Bell's pricing of its PBXs and key systems as predatory. Second, Litton challenged Bell's PCA requirement on two grounds. Its principal claim was that Bell's 1973 opposition to certification had violated the Sherman Act. Although its business plan had assumed that the PCA would remain in effect until 1973, Litton also claimed that the initial filing of the post-*Carterfone* tariffs in 1968 had violated the Sherman Act because Bell's tariffs had failed to establish the kind of certification program that the FCC adopted in 1978, ten years later.

Bell argued that neither of Litton's PCA charges provided any basis for antitrust liability. First, it contended that its opposition to certification was protected under the *Noerr-Pennington* doctrine. It asserted this claim by seeking partial summary judgment, by moving for a directed verdict at the close of plaintiffs' case, and by moving to exclude the evidence of the deButts's

[7]The FCC's statutory findings of "unreasonableness" are "rhetoric" that must be invoked before the FCC can order new practices. *MCI Telecommunications Corp.* v. *FCC*, 627 F.2d 322, 336-38 (D.C.Cir. 1980).

speech and of its pleadings before the FCC. A732-39, 3947-49; R.60, 64. The District Court denied these motions, reasoning that Litton had alleged that Bell's use of the Hunt studies had been "false" or "misleading" and therefore a "sham." App. 97a, 121a-123a. However, the District Court recognized that its interpretation of the sham exception to *Noerr-Pennington* was "not exactly the same as the sham exceptions that have previously been recognized by the courts" and that it "was sticking [its] neck out." A2033, A16471-72.

After excluding the New York Public Service Commission's finding that the PCA was "absolutely necessary," the trial court submitted the issue whether Bell had opposed certification in bad faith to the jury. The trial court refused Bell's proposed instruction that tracked the language in *United Mine Workers* v. *Pennington*, 381 U.S. 657, 669-70 (1965), and stated that advocacy is protected even if Bell's intent had been anticompetitive. App. 145a-147a. Instead, over Bell's objection, the court instructed the jury that Bell's opposition would be unprotected if it was found, by a preponderance of the evidence, to have been "interposed in bad faith for the purposes of excluding competition." The instructions went on to state that administrative proceedings take time and that creating delays does not violate the Sherman Act as long as the "petition" is "based on a good faith interest in influencing the agency." Finally, the instructions stated that there is a "sham exception" to these principles where "misrepresentations" are made to agencies. App. 153a-156a.

Second, Bell contended that there was no basis for Litton's separate charge that the filing of the post-*Carterfone* tariffs violated the Sherman Act. Although Bell's conduct had been held not to be absolutely immune from antitrust liability, App. 98a-121a, Bell argued that reasonable attempts to comply with state and federal regulatory policy do not violate the antitrust laws and that the tariffs at issue not only were a reasonable effort, but were repeatedly held to have *gone beyond* the then existing regulations by permitting customers to provide their own tele-

phone instruments.[8] The District Court denied Bell's motion for a directed verdict (A6029), refused to instruct the jury under this standard (App. 147a-149a), and instead, over Bell's objection (App. 151a), told the jury that the tariff filing must be found to violate the antitrust laws if Bell "knew or should have known at the time" that "the establishment of standards was a practical method" of protecting the network. App. 153a.[9] Bell also contended that, in any event, Litton's claim as a customer was barred by the filed tariff doctrine of *Keogh* v. *Chicago & Northwestern R.Co.*, 260 U.S. 156 (1922), but the District Court refused to dismiss this claim (A6029).

The Verdict. The jury found for Litton on the charge of "opposing certification in bad faith" and on two other charges.[10] It found against Litton on four charges, including the pricing charge and the charge that Bell was guilty of "intentionally providing unduly expensive, inefficient, or unreliable devices." The jury reported it was divided on two charges, including the charge that Bell initially filed the interface device tariff in bad faith. The jury found Litton had been damaged as a competitor in the amount of

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[8]Bell also contended that the filing of the tariff was the first step in its successful efforts to persuade the FCC and the States to permit the PCA tariff to take effect, to hold that the PCA complied with existing policy, and ultimately to prescribe the PCA for all unregistered equipment. The District Court's instructions stated that the *Noerr-Pennington* doctrine applied to the tariff filing. App. 156a.

[9]The District Court also gave a general instruction on the effect of regulation that stated, over Bell's objection, that state regulatory commissions had had no authority to restrict use of telephone instruments and that regulation was but "one factor" that could be considered in assessing Bell's conduct. App. 152a.

[10]These were: "intentional delay in providing and installing interface devices," and "bad faith refusal to sell inside wiring at all or on a reasonable basis." Although initially divided, the jury subsequently also found Bell guilty of "bad faith delay in making cutovers." Because each of these three charges could only have affected individual customer transactions, none of them could support the entire judgment. Moreover, Litton did not produce any evidence that any of these practices cost it a single customer. If the judgment is reversed, one issue on remand will be whether Litton is entitled to a new trial on these charges.

$91,990,000 and had been damaged as a customer in the amount of $268,243. App. 156a-160a.

The damages award was keyed to the period in which Bell opposed certification. The award of $91,990,000 is, to the dollar, the sum of all Litton's actual losses plus all its alleged lost profits from 1973 through 1978, the year certification was adopted for PBXs and key systems. Although Litton sought to recover PCA charges it paid as a customer over the entire eleven year period from 1969 through 1979, the jury awarded, to the dollar, six-elevenths of the amount claimed, obviously awarding damages for the six year period from 1973 through 1978.

After receiving the verdict, the trial court, at 5:18 p.m., sent the jury back to try to reach agreement on the issues on which it was divided. Twenty two minutes later, the jury resolved both remaining charges against Bell. The damages award was not changed.

Second Circuit's Decision. On appeal, Bell reiterated each of its arguments relating to opposition to certification and its advocacy of the PCA requirement. The Second Circuit, however, did not engage in an independent assessment of any aspect of Bell's opposition to certification or determine itself whether it was reasonable and constitutionally protected activity. Instead, it set forth two "versions" of the facts. The first was the Bell "version," which recounted some of the regulatory history, the FCC holdings that the 1968 tariffs complied with *Carterfone* and with all existing regulations, and the opposition to certification by the States, independent telephone companies, two FCC Commissioners, and the Federal-State Joint Board. App.16a-24a. The second was the "Litton version" which rested on the premise (which has been shown to be false) that *Carterfone* and *Hush-a-Phone* somehow decided the certification issue, which emphasized the lack of empirical proof of harm, and which further drew numerous inferences from Bell's internal memoranda, including Bell memoranda that had discussed proposals for a *different* type of PCA that was *not* adopted in the filed tariffs. App. 24a-33a.

The Court of Appeals recognized that the jury finding on the initial filing of the post-*Carterfone* tariffs in 1968 was made after

the jury "render[ed] the main verdict on liability and damages," that it did not affect the award, and that Litton had assumed that the PCA would remain in effect until 1973. App. 33a-34a, 78a. Nevertheless, the court analyzed the belated finding on the filing of the PCA tariff as well as the separate finding that Bell's opposition to certification had violated the antitrust laws.

First, it held that the *Noerr-Pennington* doctrine was inapplicable to the case. The court rejected the argument (p. 16n.8, *supra*) that the tariff filing was protected by *Noerr-Pennington*, App. 42a-47a, and further held that it had been properly found to violate the antitrust laws because it violated the "mandate in *Carterfone*." App. 51a. It did not address Bell's argument that the instruction on this issue was erroneous. The court further held, by a vote of 2 to 1, that *Noerr-Pennington* was also inapplicable to Bell's opposition to certification because its opposition had the effect of maintaining the PCA requirement as the only alternative to certification. App. 47a.

Alternatively, an undivided court held that both the filing of the PCA tariff and the opposition to certification were "baseless" and a "sham." Each of the alternative holdings relied on the fact that Litton's "version" of the fact would support "inferences" that Bell's opposition "embraced much more than merely advocating a position," that it was "baseless" because it violated the "mandate in *Carterfone*," that Bell "affirmately misled" the FCC, and that Bell's subjective intent had not been to influence government action, but to delay it. App. 47a-54a.

The Court of Appeals further held that some of the District Court's evidentiary rulings, App. 69a-71a, including exclusion of the New York commission finding that the PCA was "absolutely necessary," were erroneous, but not reversible error. It criticized the *Noerr-Pennington* instructions, but held that they were sufficient. App. 54a-58a. The court further held that it would follow an earlier panel decision that customer claims are not barred

by the filed tariff doctrine "unless otherwise advised by higher authority" and that this decision established that Litton could recover the PCA charges it paid because, under the Second Circuit's view, the FCC had held that the post-*Carterfone* tariffs had been invalid when filed. App. 73a-74a.

Finally, the court rejected Bell's argument that the damages award included losses and lost profits caused by price reductions that the jury had found to be lawful. App. 84a-85a. It held that Litton's damages evidence did not assume that Bell's price reductions were unlawful, despite the fact that Litton's damages witness testified that he could not disaggregate the effects of the price reductions (App. 84a) and that the whole theory of Litton's case was that its demise had been caused by the *combination* of the PCA and the price reductions. A6188, 6195 (closing argument).

REASONS FOR GRANTING THE WRIT

The Second Circuit held that a party may be penalized with treble damages liability of $276 million for participating in a public debate on an issue of fundamental public importance and for advocating a reasonable position that comported with traditional public interest concerns as well as the positions of numerous disinterested representatives of the public interest. This holding "strikes at the very center of the constitutionally protected area of free expression," *New York Times* v. *Sullivan*, 376 U.S. 254, 292 (1965), and will inevitably inhibit constitutionally valuable speech. The Second Circuit's decision flatly conflicts with the legal standards applied by numerous other Courts of Appeals and with Judge Harold Greene's holding on the same evidence in a parallel Government antitrust action. It presents questions raised in no fewer than 17 pending cases.

I. The Second Circuit's Decision That Opposition To Certification Is Not Protected Activity Conflicts With The Decisions Of This Court And Of Other Courts Of Appeals.

The "very foundation of constitutional government" lies in freedom to petition governmental officials, to participate in legislative proceedings, and to state opinions on matters of public im-

portance—all "to the end that government may be responsive to the will of the people." *DeJonge* v. *Oregon*, 299 U.S. 353, 365 (1937). This Court's decisions have sought to assure that the application of federal or state statutes will not prevent or inhibit persons from engaging in this constitutionally valuable activity and providing "the information upon which governments must act." *Eastern R.R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 139 (1961); *First National Bank* v. *Bellotti*, 435 U.S. 765, 791-92 & n.31 (1978).

The Noerr-Pennington Doctrine. In *Noerr*, this Court held that the Sherman Act could not be applied to a railroad's campaign to "destroy truckers as competitors" by influencing state and federal officials to pass and enforce laws. 365 U.S. at 145. *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), expanded *Noerr*, holding that efforts to influence executive officials cannot be held to violate the Sherman Act, even if accompanied by an anticompetitive intent that would otherwise violate that statute. In *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972), this Court made it explicit that the *Noerr-Pennington* doctrine rests on the First Amendment and is fully applicable to advocacy before administrative agencies. The First Amendment has accordingly been consistently held to protect efforts to litigate claims of public importance. See, *e.g.*, *NAACP* v. *Button*, 371 U.S. 415 (1963).[11]

Bell's opposition to certification is unquestionably activity that is protected by the *Noerr-Pennington* doctrine and the First Amendment.[12] The Second Circuit's contrary holding largely rests on its acceptance of Litton's claim that the doctrine only applies to attempts to obtain affirmative government action that would injure a competitor (as in *Noerr* and in *Pennington*), but

[11] In *Bill Johnson's Restaurants Inc.* v. *NLRB*, U.S. , 51 U.S.L.W. 4636 (May 31, 1983), the importance of petitioning activity led this Court to hold that the NLRB may not enjoin nonfrivolous litigation that raises *no* issues of public importance and that was filed to retaliate against employees for exercising their organization rights.

[12] The belated finding on the initial filing of the tariff is irrelevant to the judgment, and, in any event, is unsupportable (see p. 27-28, *infra*).

does not apply to advocacy that opposes the entry of new competitors into a market and that maintains an allegedly anticompetitive state of affairs or carrier practice (such as the PCA requirement). App. 42a, 47a. There is no support for such an unworkable distinction. Both kinds of advocacy can and do address fundamental public interest concerns. *California Motor Transport* and numerous court of appeals cases have held that the First Amendment is fully applicable to advocacy in opposition to liberalized entry. For example, in *Mid-Texas Communications Systems, Inc.* v. *AT&T*, 615 F.2d 1372 (5th Cir.), *cert. denied*, 449 U.S. 912 (1980), Southwestern Bell had denied interconnections needed to enter the local exchange business on public interest grounds. Its subsequent opposition before the FCC to a petition for an interconnection order was held to be absolutely protected by the First Amendment and the possibility that a jury had relied on this conduct required reversal of the judgment.[13] *Id.*, at 1384.

The Sham Exception. Because the initiation of proceedings can be a powerful weapon to injure competitors, see R. Bork, The Antitrust Paradox 357 (1978), there is a "sham" exception to these principles. However, it has been narrowly construed to assure that constitutionally valuable activity is not inhibited. The exception was inapplicable in *Noerr*, despite the fact that the railroad's campaign had been found to have "deliberately deceived the public and public officials" and to have been "reprehensible." 365 U.S. at 145. In *California Motor Transport*, the Court applied it against a truckers' association only because it had filed

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[13] *Accord, Federal Prescription Service, Inc.* v. *American Pharmaceutical Ass'n*, 663 F.2d 253, 257 (D.C. Cir. 1981) (protecting opposition to new entry of mail order houses); *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Exec. Bd.*, 542 F.2d 1076, 1081 (9th Cir. 1976) (protecting opposition to license application); *Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220, 230 (7th Cir. 1975) (protecting opposition to award of new cable television franchises); *Mark Aero, Inc.* v. *TWA*, 580 F.2d 288 (8th Cir. 1978) (protecting opposition to attempts to reopen an airport).

The Second Circuit's other reasons for holding opposition to certification unprotected rest on the same facts that led it to characterize Bell's opposition as a sham. App. 48a n.35. They are discussed below.

protests against each and every license application of competitors even "*without* probable cause" and thereby effectively barred competitors from access to the agency that could authorize their entry. 404 U.S. at 512. The Court stated that different standards applied to adjudicatory than to legislative proceedings, but carefully limited the sham exception to similar conduct which "may corrupt administrative or judicial processes," such as bribery. *Id.*, at 513.

The ultimate test of whether conduct may be penalized as a sham is whether it, "like intentional falsehoods or knowingly frivolous claims," consists of activities that can be penalized without inhibiting debate of public affairs. *Bill Johnson's Restaurants Inc.* v. *NLRB*, *supra*, 51 U.S.L.W. at 4639, *quoting* Balmer, Sham Litigation and The Antitrust Laws, 29 Buff. L. Rev. 39, 60 (1981). It requires a sensitive judicial assessment of the statements to determine "whether they are of a character which the principles of the First Amendment protect." *Pennekamp* v. *Florida*, 328 U.S. 331, 335 (1946).[14] Numerous courts of appeals have thus held that conduct cannot be a sham unless it is overtly corrupt and not merely normal and legitimate advocacy or its incidents.[15]

The conflict between the Second Circuit's holding and these principles is most vividly demonstrated by Judge Harold Greene's decision in *United States* v. *AT&T*, 524 F.Supp. 1336 (D.D.C.

[14]The judicial assessment is normally an independent examination of the record to ensure that the governing standards have been properly applied. See *New York Times* v. *Sullivan*, *supra*, 376 U.S. at 385-92; *Connick* v. *Myers*, U.S. , 51 U.S.L.W. 4436, 4439 (April 20, 1983); *Bose Corp.* v. *Consumers Union*, 692 F.2d 189, 195 (1st Cir. 1982), *cert. granted*, 51 U.S.L.W. 3774 (April 25, 1983). At a minimum, the reviewing court must assess the speech to assure that it is of a character that can be permissibly condemned. See *Jenkins* v. *Georgia*, 418 U.S. 153 (1974). The Second Circuit did neither.

[15]*Federal Prescription Service, Inc.* v. *American Pharmaceutical Ass'n*, *supra*, 663 F.2d at 263; *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Exec. Bd.*, *supra*, 542 F.2d at 1080; *Semke* v. *Enid Automobile Dealers Assn.*, 456 F.2d 1361, 1366 (10th Cir. 1972); *Mid-Texas Communications Systems* v. *AT&T*, *supra*, 615 F.2d at 1384.

1981), which is a parallel Government antitrust action in which the same evidence of opposition to certification was presented during the Government's case-in-chief. There, although refusing to dismiss most of the Government's other claims if they had a conceivable basis, Judge Greene held that "of course, evidence of AT&T's position before the FCC in its certification docket No. 19528 does fall within the [*Noerr-Pennington*] doctrine," is not a sham, and cannot be a basis of antitrust liability. *Id.*, at 1363 n. 110, 1361-64.

Other considerations make the conflict even clearer. First, there is no basis for even applying the sham exception. It was the FCC that initiated the rulemaking proceeding, *not* Bell. Bell was responding to an ongoing debate by advocating a proposal that the FCC had *stated* it was considering and had invited comment: maintenance of the PCA status quo. The reasons for the sham exception—the fear that the initiation of lawsuits or filing of protests to license applications can be an instrument to harass competitors—are simply inapplicable. Speech at the invitation of government cannot be penalized. See *Cox* v. *Louisiana*, 379 U.S. 559, 568-71 (1965). This is particularly so because John deButt's public speech and Bell's pleadings stated opinions on issues of transcendant "public concern," such as the most cost-effective way to protect a vital national resource and the effect of certification on the quality of essential service, future innovation, and residential rates. See *Connick* v. *Myers, supra,* 51 U.S.L.W. at 4438; *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 40-43 (1971) (Opinion of Brennan, J.).

More fundamentally, Bell's advocacy unquestionably had a reasonable basis. Identical public interest concerns led two FCC Commissioners, the Federal-State Joint Board that sat as an administrative law judge, numerous state commissions, their national association, and independent telephone companies to oppose certification of PBXs and key systems. These facts conclusively demonstrate that Bell's conduct may not be found to be a sham.

The District Court's and the Second Circuit's conclusions that Bell could be found to have "affirmatively misled" the FCC, to

have made "baseless" or "unsupportable" claims of harm and to therefore be guilty of sham conduct (see App. 48a, 51a-53a) rests on Bell's disclosure of the Hunt studies and its reliance upon them. See pp. 11-12, *supra*. But this was valuable speech, and it cannot be penalized. The Hunt studies were *true;* there *were* higher trouble reports and violations of signal power standards on lines with customer provided equipment. Although their author and others recognized that these studies were not scientific proof of *"specific harms"* to the network, the studies were assuredly "sufficiently consequential" to be circumstantial evidence that, as Bell contended, even interconnection under the post-*Carterfone* tariffs had had an adverse effect on *service quality*. See pp. 11-12, *supra*. The District Court's and the Second Circuit's holding that it is permissible for juries to condemn such statements of opinions as "misleading" or "false" cannot be squared with the First Amendment, see *Gertz* v. *Welch*, 418 U.S. 323, 339-40 (1974), and would inevitably penalize and deter valuable speech.

Other courts of appeals have flatly rejected the Second Circuit's position, holding that statements of opinion made to influence policymaking (*e.g.*, on "health concerns") are absolutely protected even if "not satisfactorily supported at trial." *Federal Prescription Service, Inc.* v. *American Pharmaceutical Ass'n, supra*, 663 F.2d at 257; see *Woods Exploration & Producing Co.* v. *Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971) (denying protection only because false forecasts were ministerial filings unrelated to policy arguments). Other courts of appeals have even held that factually false statements must be protected where, as here, they are made in legislative proceedings before an agency. *Mark Aero. Inc.* v. *Trans World Airlines, Inc., supra*, 580 F.2d at 297 (8th Cir. 1978); *Metro Cable Co.* v. *CATV of Rockford, Inc., supra*.

The Second Circuit's fundamental error was its failure to assess Bell's conduct itself and hold that the incidents of legitimate advocacy cannot be the basis for imposing antitrust liability. Instead, it upheld the judgment on the ground that there was a "Litton version" of the facts under which a jury could transmute

Bell's responsible and constitutionally valuable advocacy into a sham. For example, the Second Circuit's summary of the "AT&T version" of the facts *quotes* the FCC's holding that *Carterfone* did not authorize customers to substitute their own telephone instruments and that the post-*Carterfone* tariffs complied with *Carterfone*—which was reiterated five times between 1968 and 1975. App. 17a. Nevertheless, the Second Circuit holds that the jury could permissibly adopt a Litton version of the history in which both the tariffs and Bell's opposition to certification violated the "mandate in *Carterfone*" and were therefore "baseless." App. 51a. This holding not only violates the principle that the meaning of regulatory decisions is a question of law for the court and cannot be submitted to a jury, see, *e.g.*, *Trust of Bingham* v. *Comm'r*, 325 U.S. 365, 370-71 (1945); *Marshall* v. *Isthmian Lines, Inc.*, 334 F.2d 131, 137-38 (5th Cir. 1964), but, by permitting juries to convert reasonable speech into a sham by engaging in such historical revisionism, violates the First Amendment.

Similarly, the Second Circuit held that the jury could infer that claims of harm made by the National Academy of Sciences, state commissions, and Bell and ultimately *accepted* by the FCC itself,[16] were "baseless" because there were internal Bell memoranda commenting on the absence of direct evidence of harm (which was only one of *four* issues raised, see pp. 9-12, *supra*) and indicating that some employees did not favor retention of the PCA and believed that Bell might not succeed. App. 25a-26a, 28a-29a, 52a. But such internal memoranda evaluating evidence and intracorporate debate will accompany *any* legitimate exercises of First Amendment rights, and such evidence cannot permissibly be used to penalize constitutionally protected speech. Such intracorporate debate should be *encouraged*, not inhibited.

Finally, the Second Circuit permitted Bell's speech to be condemned by extrapolating from internal Bell documents that are

[16]The FCC adopted its certification regulations to protect the network against precisely these risks of harm that the NAS and Bell identified. The FCC disagreed with Bell and the NAS only on matters of opinion: the overall effect of increased competition and the cost-effectiveness of different network protection mechanisms.

wholly irrelevant to Bell's defense of the PCA requirements and its opposition to certification. For example, the Court of Appeals relies extensively on internal memoranda stating that a proposal for a *different* type of PCA—which was rejected by Bell and *not* embodied in the post-*Carterfone* tariffs—was "redundant, uneconomic, and unnecessary" and that an earlier draft tariff, which was *not* filed, violated *Carterfone*.[17] App. 27a & n.15; 28a & n.16; 51a-53a. To uphold the verdict on the basis of this evidence was particularly improper because the jury here found that the PCA required by the post-*Carterfone* tariffs was not "unduly expensive, inefficient, or unreliable." See p. 16, *supra*.

Under the Second Circuit's approach, no advocacy, no matter how reasonable and legitimate at the time, can be immune from post-hoc condemnation through extrapolation from irrelevant conduct or outright revisionism of history. The fact that the Second Circuit's holding refers primarily to John deButt's public speech before NARUC to support the judgment, App. 21a, 31a—which was a classic and responsible exercise of freedom of speech, see p. 11, *supra*—vividly demonstrates the potential for interference with First Amendment values.

In any event, Bell's speeches and pleadings had a number of discrete aspects. Yet the Second Circuit held that no attempt need be made to determine whether the delays in certification had been caused by aspects that were unquestionably constitutionally protected, such as the advocacy of economic issues by the States

[17]Similarly, the Second Circuit stated that the jury could infer that Bell sought to delay certification because it failed to withdraw from the PBX Advisory Committee after Bell decided to oppose certification in March, 1973. App. 52a-53a. But that conduct, too, is irrelevant because it occurred *after* the PBX Advisory Committee issued its "final report" in August, 1972 (see App. 19a, 20a) and at a time when the public was preparing comments on the report. The Court of Appeals also refers to the even more irrelevant fact that Bell, which undisputably made the single greatest contribution to that committee's work, A4223, A4253-54, had been late with some "homework assignments" after completion of the final report, after the rulemaking proceeding began and at a time when the FCC indisputably had the information necessary to rule on certification, and *before* the FCC even undertook to address the critical social and economic issues. See pp. 8-9, 13 n.6, *supra*.

as well as Bell. Compare *Mt. Healthy City Bd. of Ed* v. *Doyle*, 429 U.S. 274, 285-86 (1977) *with* App. 78a n.49. This constitutional error is an egregious one because it was the economic issues that delayed certification until long after Litton had left the relevant markets. See p. 13 n.6, *supra*.

A holding that Bell's opposition to certification cannot be held to violate the antitrust laws as a matter of law will require reversal of the entire judgment on liability as well as damages (see *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931)) and resolve the fundamental questions presented. However, there are other issues that are logically part of any review of this case, especially because they are based on the same false premise that infected the Second Circuit's decision on the main issue. See pp. 3-9, *supra*. The first is the question whether, if there is a jury question under *Noerr-Pennington* (contrary to Bell's claim), the jury instructions may make the threshold question of the protected character of opposition to certification depend on a finding by the preponderance of the evidence that Bell's "purpose was to exclude competition."[18]

The second is the lower court's refusal to follow decisions of other courts of appeals[19] and hold that conduct cannot be held to violate the antitrust law if it was a reasonable attempt to comply with the then existing state and federal regulatory requirements.

[18]Such an instruction was the very basis for the reversal of the judgment in *United Mine Workers* v. *Pennington*, *supra*, 381 U.S. at 669-70. Contrary to the Court of Appeals' reasoning, the District Court's later sham instruction, which itself did not explicitly refer to *purpose*, was inadequate to cure the defect. App. 56a-57a. Under the instructions as given, the jury would never have reached the sham exception if it found that the advocacy's purpose had been to exclude competition and that Bell's advocacy was therefore unprotected in the first instance. The refusal to give a "clear and convincing" evidence instruction was an error that further increased the risk of punishment of protected speech.

[19]*Phonetele, Inc.* v. *AT&T*, 664 F.2d 716, 737-43 (9th Cir. 1981), *cert. denied*, 103 S.Ct. 785 (1983); *Mid-Texas Communications Systems, Inc.* v. *AT&T*, *supra*, 615 F.2d at 1380-81. See generally *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 360-61 (1963) (regulated firms must be given "sufficient breathing space" to carry out regulatory responsibilities).

Under this standard, Bell's post-*Carterfone* tariffs could not be found to have been filed in bad faith or to have been antitrust violations because the FCC then *held* that customers had no right to substitute Litton's PBXs or key systems for Bell equipment and that Bell's tariffs went *beyond* any existing regulatory requirements. See p. 7, *supra*. The court should have directed a verdict or at least instructed the jury under the correct standard. The third is the decision that customers can bring treble damages actions to recover tariffed charges. This holding is inconsistent with the filed tariff doctrine of *Keogh* v. *Chicago & Northwestern R.R.*, 260 U.S. 156 (1922), and its numerous progeny, and conflicts with *McLeran* v. *El Paso Natural Gas*, 491 F.2d 1405 (5th Cir. 1974), *aff'g*, 357 F.Supp. 329, 331-32 (S.D. Tex. 1972), and with *Essential Communications Systems* v. *AT&T*, 610 F.2d 1114, 1121-22, 1124 (3d Cir. 1979).

II. The Questions Presented Have Enormous National Importance.

Because the questions presented are fundamental to our form of government, they would possess great national importance even if the sole effect of the Second Circuit decision were to inhibit constitutionally valuable activity in all rulemaking proceedings. For that reason alone, certiorari should be granted.

Moreover, the precise question whether Bell's advocacy of the PCA and its opposition to certification is protected conduct has been raised in no fewer than 17 pending private treble damages cases.[20] The Second Circuit's decision has itself spawned litiga-

[20] *General Dynamics Corp.*, v. *AT&T*, No. 82-C-7941 (N.D.Ill.); *Glictronix Corp.* v. *AT&T*, No. 82-4447 (D.N.J.); *Gregg Communication Systems* v. *AT&T*, No. 82-C-6291 (N.D. Ill); *Jack Faucett Assoc., Inc.* v. *AT&T*, No. 81-1804 (D.D.C., 1981) (and four consolidated cases); *KWF Industries, Inc* v. *AT&T*, No. 83-0431 (D.D.C.); *Phonetele, Inc.* v. *AT&T*, No. 74-3566-FW (C.D.Cal.); *Rice International Corp.* v. *AT&T*, No. 82-2573 (S.D.Fla.); *Selectron, Inc.* v. *Pacific Northwest Bell Telephone Co., et al.*, No. 76-965-BE (D.C.Ore.); *Sound, Inc.*, v. *AT&T*, No. 76-182-2 (S.D.Iowa) (and one consolidated case); *DASA Corp.* v. *AT&T*, No. 83-2695 (E.D.Pa.); *Amtel Communications, Inc.* v. *AT&T*, No. 82-8754 (S.D.N.Y.); *Telephonic Equipment Corp.* v. *AT&T*, No. 82-C-8478 (S.D.N.Y.).

tion. Despite the fact that the Second Circuit's decision may not be given "offensive" collateral estoppel effect under the principles of *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322 (1979), plaintiffs in several of the pending private cases have already moved for partial summary judgment on the ground that the Second Circuit decision should be treated as collateral estoppel. By granting certiorari and reversing the Second Circuit, this Court can eliminate the litigation and subsequent appeals on collateral estoppel, simplify and provide lawful standards for 17 pending cases, as well as resolve issues fundamental to democratic government.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted and the case set for oral argument.

Alternatively, the petition should be granted, the judgment below should be summarily vacated on the ground that it rests on a false premise of regulatory fact (see pp. 3-9, *supra*), and the case remanded to the Court of Appeals for reconsideration in light of the fact that the 1968 tariffs were not in violation of *Carterfone*, as the FCC held in passing on that tariff and in four subsequent opinions. Where a constitutional decision rests on such a false premise, this Court may reverse on that ground and thereby avoid the constitutional question. See, *e.g.*, *Neese* v. *Southern Railway Co.*, 350 U.S. 77 (1955); *Standard Oil Co.* v. *Johnson*, 316 U.S. 481 (1942).

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